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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 08/01/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/945,318

Applicant(s)

KNIGGE ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-76 is/are pending in the application.
- 4a) Of the above claim(s) 68-76 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-67 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4,5.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

### DETAILED ACTION

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claim 1-67, drawn to a package comprising a bag and a frangible item, classified in class 426, subclass 124.
  - II. Claim 68-76, drawn to a method of packaging an item comprising a frangible material, classified in class 53, subclass 403.
2. The inventions are distinct, each from the other because:
3. Inventions I and II are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the package does not have to be heat sealed.
4. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.
5. During a telephone conversation with John O'Toole on July 24, 2003 a provisional election was made with traverse to prosecute the invention of group I, claims 1-67. Affirmation of this election must be made by applicant in replying to this Office action. Claim 68-76 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-3,15,27-29,40-42,45,46,47,58, 66,67 are rejected under 35

U.S.C. 102(a) as being anticipated by Cook et al. (US 6233907 B1).

8. Cook et al. teach a rectangular bag, which could be reclosable, made from a single laminated co-extruded sheet with an oxygen barrier, a moisture barrier, a metal layer (i.e. the bag is opaque) vacuum sealed, and containing potato chips, as recited in claims 1-3,10,15,27,29,40-42,45,46,47,58,62,63,66 (Column 3, lines 1-12, Column 4, lines 40-45, Column 5, lines 22-57, Figures).

9. Claims 1,2,4,13,15,27,28,40-47,51-58 are rejected under 35 U.S.C. 102(a) as being anticipated by Beer (US 6213645 B1)

10. Beer teaches a rectangular reclosable bag, made from a laminated sheet with an oxygen barrier, a moisture barrier, vacuum sealed, sealed with a pressure sensitive cold seal and a tin tie, clip or zipper closure, and containing breakfast cereal, as recited in claims 1,2,4,13,15,27,28,40-47,51-58 ( Column 3, lines 13-40, Column 4, lines 15-67,Column 5, line 7 to Column 6, line 3).

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11. Claims 1-4,10,15-17,21,27-32,40-47,51,58 are rejected under 35 U.S.C. 102(b) as being anticipated by Kraft Foods Inc. (WO9812110).

12. Kraft Foods Inc. teaches a rectangular reclosable bag made from a single laminated sheet with an oxygen barrier, a moisture barrier, a metal layer (i.e. opaque) vacuum sealed, held within an open container (i.e. carton), has a semi rigid portion (i.e. gusseted) and containing potato crisps ,rice grains or flakes, or flour as recited in claims 1-4, 10,15-17, 21,27-32,40-47,51,58 (Abstract Page 1,12, 17,20,37).

13. Claims 1,2,9-12,14,15,26-29,32,33,41,58 are rejected under 35 U.S.C. 102(b) as being anticipated by Anderson (US 5500303).

14. Anderson teaches an improvement over conventional potato chip packaging made from polymeric films, which would be bags. The new packaging comprises comprising multilayer PP or PET laminate films with oxygen and moisture barriers, are transparent or opaque with a window, the outer layer is textured, has a labeled applied, has an interior structure and semi-rigid portion, the bag is filled with nitrogen, and has two chambers (Column 1, lines 5-58, Column 3, lines 33-61, Column 4, line 63to Column 5, line 7, Column 6, lines 36, Column 13, lines 43-54)

15. Claims 1,2,15,40,41 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Young (GB 1290836). See Page 1, lines 10-25,40-45,48-55, and 70-78.

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16. Claims 1,2,4,9,10,13,15,29,40,41, are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Croft (US 6074677). See Column 1, lines 5-18, 27-43, Column 2, lines 57-65.

17. Claims 1-4,16, 40,41,48,58, 65 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Ray (US 2370419). See Column 1, lines 1-35, Column 1 line 49 to column 2, line 2, Column 3, lines 1-56, Column 4, lines 59-63, and Column 10-23.

18. Claims 1,2,4,12,14,15,27-29,41-50,58 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Ours et al. (US 6062467).

19. Ours et al. teach a rectangular reclosable bag, made from a laminated sheet with an oxygen barrier, a moisture barrier, perforated area for opening and would also be textured, held within a carton, sealed to the dispensing portion with a peelable label, and containing breakfast cereal, as recited in claims 1-4,12,14,15,27-29,41-50,58 (Column 1, lines 15-31, Column 2, lines 60-64, Column 3, lines 30-40, Column 4, lines 20-28, Column 5, line 38 to column 6, line 48).

***Claim Rejections - 35 USC § 103***

20. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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21. Claims 5-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kraft Foods Inc. (WO9812110) as applied to claims 1-4,10,15-17,21,27-32,40-47,51,58 above, further in view of Giacomani (US 6251450 B1).

22. Kraft Foods Inc. teaches a potato chips bag, but is silent in teaching the location of any type of a premium or coupon as recited in claims 5-8 or two chambers as recited in claim 8. Giacomani teaches the conventional placement of a premium or coupon in a potato chips bag externally, internally, or in secondary compartment (Column 5, line 64 to Column 6, line 30). Therefore, it would have been obvious to modify Kraft Foods Inc. and include a premium/coupon externally, internally, or in a secondary compartment since this is a well known feature of potato chip bags and one would have been substituting one conventional bag design for another.

23. Claims 18-23, and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Beer (US 6213645 B1) as applied to claims 1,2,4,13,15,27,28,40-47,51-58, further in view of Bedenk et al. (US 3708308).

24. Beer teaches breakfast cereal, but is silent in teaching biscuits, shreds, puffed pieces, their particular shapes as recited in claims 18-23 and 26. Bedenk et al. is relied on as evidence of the conventionality breakfast cereal such as shreds, biscuits, puffed pieces, such as spheres or flakes, and pellets (Column 1, lines 16-20, Column 4, lines 64-66). Therefore it would have been obvious to further include biscuits, shreds, puffed pieces, such as spheres or irregular flakes, pellets since one would have been

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substituting one cereal form for another. It would have been further obvious to select a pillow shaped cereal since biscuit forms include pillow shapes.

25. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Beer (US 6213645 B1) as applied to claims 1,2,4,13,15,27,28,40-47,51-58, further in view of Schwab et al. (US 342635).

26. Beer is silent in teaching marbits. Schwab et al. teach it is well known to include marbits with cereal packages for a pleasing variety (Column 1, lines 5-34). Therefore, it would have been obvious to further include marbits with the cereal of Beer since it was known that this is a pleasing variety of cereal and one would have been substituting one conventional type of packaged cereal for another.

27. Claim 25 is rejected under 35 U.S.C. 103(a) as being unpatentable over Beer (US 6213645 B1) as applied to claims 1,2,4,13,15,27,28,40-47,51-58, further in view of DiPoto (US 5558930).

28. Beer is silent in teaching unpopped popcorn. Dipoto teaches both cereal and unpopped popcorn require the same barrier packaging (i.e. moisture free-environment in (Column 1, lines 13-20). Therefore, it would have been obvious to include unpopped popcorn in the package of Beer since unpopped popcorn has similar packaging requirements and one would have been substituting one food product requiring a moisture barrier package for another.



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29. Claims 33-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Beer (US 6213645 B1) as applied to claims 1,2,4,13,15,27,28,40-47,51-58, further in view of Galomb (US 6245367 B1).

30. Beer is silent in teaching the breakfast cereal bag has two compartments, two different products (one particulate, one non-particulate), or the specific water activity, as recited in claims 33-38. Galomb teaches packaging two different products including, breakfast cereals, in a two compartment bag, with two different products, wherein the water activity is at least about 0.1 to 0.7 for a nonparticulate portion (other foods could be dry or gellable products) and 0.2-0.4 for the particulate (i.e. cereal would fall within the range) for the convenience of eating together (Abstract, Column 8, lines 32-63). Therefore, it would have been obvious to modify Beer and include a non-particulate product with the cereal with these water activities since this provides the convenience of eating the product from the bag.

31. Claims 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kraft Foods Inc. (WO9812110) as applied to claims 1-4,10,15-17,21,27-32,40-47,51,58 above, further in view of Hellweg et al. (US 5523109)

32. Kraft Foods Inc. teaches cereal and flour, but is silent in teaching treating oat flour to prevent rancidity in oat flour containing products. Hellweg et al. teach treating oat flour to inactivate enzymes, and thus prevent rancidity, in oat four cereals (Abstract, Column 3, lines 35-53). Therefore, it would have been obvious to treat oat flour to

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prevent rancidity since it was known that oat flour/out flour products to inactivate enzymes in oat flour prior to processing.

33. Claims 59-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kraft Foods Inc. (WO9812110) as applied to claims 1-4,10,15-17,21,27-32,40-47,51,58 further in view of Carlblom et al. (US 52728439).

34. Kraft Foods Inc is silent in teaching a particular permeability as recited in claims 59-61. Carlblom et al. teach 0.013-.05 cc per sq-in per day as recited in claims 59-61 for oxygen sensitive food bags (Abstract, column 17, lines 28-37, column 23-24) Therefore, it would have been obvious to modify Kraft Foods Inc and include teach 0.013-.05 cc per sq-in per day and the recited structures of claims 59-61 since one would have been substituting one bag feature for another for oxygen sensitive food bag.

35. Claims 62-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ray (US 2370419) as applied to Claims 1-4,16, 40,41,48,58, 65, further in view of Bianchini et al (US 5487940).

36. Ray teaches an oxygen barrier layer and a moisture barrier layer, but is silent in teaching a metallized polymeric composite and PP, PE, PET or PLA as recited in claim 62, oxygen scavengers or antioxidants as recited in claim 63, or layers of aluminum oxide coated polyethylene, polyester, glass or ceramic, and a polyester seal interior of the aluminum oxide coated polyethylene layer as recited in claim 64. Miyake et al. teach barrier composite films for foods that have mechanical strength and provide

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oxygen and moisture barriers, like Ray, and Miyake et al. further include a metallized polymeric layer as the moisture barrier and polyethylene. Miyake et al. teach layers of aluminum oxide coated polyethylene, polyester, glass or ceramic, and a polyester seal interior of the aluminum oxide coated polyethylene layer (Column 1, lines 5-13Column 3, lines 12-22Column 4, line 40 to Column 5, line 2, Column 5, lines33-42Column 10, line 33 to Column11, line 25, Column 15, line49-63, Column 17, lines25-35). Therefore, it would have been obvious to include a metallized polymeric layer as the moisture barrier and a substrate of polyethylene, in addition to an oxygen barrier, antioxidants, as recited in claim 63, or even layers of aluminum oxide coated polyethylene, polyester, glass or ceramic, and a polyester seal interior of the aluminum oxide coated polyethylene layer since one would have been substituting one composition for another for the same purpose: oxygen /moisture barriers film-based food packages with sufficient mechanical strength.


### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications. Any inquiry of a

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general nature or relating to the status of this application or proceeding should be directed to the receptionist at (703) 308-0061.

Robert Madsen  
Examiner  
Art Unit 1761  
July 28, 2003

  
**MILTON I. CANO**  
**SUPERVISORY PATENT EXAMINER**  
**TECHNOLOGY CENTER 1700**